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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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BETHEL BROADCASTING, INC.,
*Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION,
*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

Whether, when considering the comparative qualifications of two or more applicants competing for a valuable and mutually exclusive authorization, an administrative agency may ignore the effect of its own procedural rules, which rules had previously operated to fix the comparative positions of the competing applicants as of a date certain.

Whether, when reviewing an order of an administrative agency, a circuit court may support that order with a reasoned basis not articulated by the agency.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Bethel Broadcasting, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The order of the court of appeals denying Petitioner's petition for rehearing (Pet. App. 1a) and the order of the court of appeals denying Petitioner's suggestion for rehearing *en banc* (Pet. App. 2a) are not reported orders. Pursuant to D.C. Cir. R. 13(c), the judgment of the panel of the court of appeals is set forth in an unpublished memorandum (Pet. App. 3a). The opinion and order of the Federal Communications Commission is officially reported at 102 F.C.C. 2d 288 (1985) and is reprinted in the appendix hereto (Pet. App. 7a). The decision of the Commission's Review Board is officially re-

ported at 99 F.C.C. 2d 173 (Rev. Bd. 1984) and is reprinted in the appendix hereto (Pet. App. 16a). The decision of the Commission's administrative law judge is officially reported at 99 F.C.C. 2d 201 (ALJ 1983) and is reprinted in the appendix hereto (Pet. App. 58a).

## PARTIES BELOW

The parties to the proceeding in the court of appeals, other than the parties reflected in the caption of this petition, are as follows: United American Telecasters, Inc.; Riverside Family Television; Sunland Communications Company; and KIST Corp.

## JURISDICTION

The orders of the court of appeals denying Petitioner's petition for rehearing and suggestion of rehearing *en banc* were entered on December 29, 1986 (Pet. App. 1a & 2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## REGULATION INVOLVED

The relevant portions of Section 73.3522 of the Rules of the Federal Communications Commission (47 C.F.R.) are set out in an appendix of regulations (Pet. App. 149a).

## STATEMENT

On July 20, 1981 Bethel Broadcasting, Inc. ("Bethel") filed with the Federal Communications Commission ("Commission") an application seeking authority to construct a new commercial television station to operate on Channel 62 at Riverside, California. Several other applicants also filed timely applications seeking the use of Channel 62 at Riverside. Because the application proposals of the various applicants were electromagnetically incompatible with each other, they were, in the term of art employed by the Commission, mutually exclusive. In

light of this mutual exclusivity, the Commission was unable to make a statutory finding that the grant of these applications would serve the public interest, convenience and necessity. Therefore, on December 23, 1981, pursuant to the requirements of Section 309(e) of the Communications Act of 1934 (47 U.S.C. Section 309(e)), the Commission designated all of the then pending competing applications for hearing to determine which of the applicants' proposals would, on a comparative basis, best serve the public interest.

The comparative proceeding was conducted by an administrative law judge ("ALJ"), who, after an extended hearing, issued his initial decision on November 24, 1983 (Pet. App. 58a). In that initial decision, the ALJ granted the application of one applicant, Sunland Communications Company ("Sunland"), and denied the remaining applications, including that of Bethel. The determinative factor in the ALJ's selection of Sunland was the comparative advantage attributed by the ALJ to the proposed integration of Sunland's purported thirty-five percent (35%) partner, Andres Soto, into the management of the proposed station.[1]

Several of the unsuccessful applicants, including Bethel, filed exceptions to the ALJ's decision with the Commission's Review Board. The exceptions generally contended that Sunland was entitled to no comparative credit on account of Soto's presence, because Soto's purported partnership and ownership interests in Sunland were not legally cognizable. Further, certain exceptors, again including Bethel, made specific contentions challenging the ALJ's analysis with regard to the validity of Soto's position in the Sunland scheme. These excep-

[1] In the context of the Commission's comparative broadcast proceedings, the term "integration" refers to the extent to which the individuals owning and controlling an applicant will participate in the day to day management of the station proposed by that applicant.

tors contended the analysis was flawed because it was based on Soto's status as of the September 1982 hearing conducted by the ALJ, rather than Soto's status as of September 7, 1981, the date on which the comparative qualifications of all the competing applicants, including Sunland, were fixed by Commission rule.

On October 19, 1984, the Review Board issued its decision (Pet. App. 16a). Therein, the Review Board determined Soto's purported participation in the Sunland partnership was a sham and, therefore, not legally cognizable. In light of this determination, the Review Board stripped Sunland of the comparative credits previously awarded on the basis of the proposed integration of Soto. After reassessing the comparative qualifications of the various applicants, the Review Board granted the application of KIST Corp. ("KIST"), and denied the remaining applications, including those of Bethel and Sunland.

Applications for Commission review of the Review Board's decision were filed by four applicants, again including Bethel. The Commission's opinion and order upon review was issued on September 24, 1985 (Pet. App. 7a). Therein, the Commission reversed the determination of the Review Board with regard to the validity of Soto's purported partnership interest, and, on that basis, granted Sunland's application and denied the remaining applications, including that of Bethel

Certain applicants, including Bethel and KIST, pursuant to 28 U.S.C. § 2342(1), timely noted appeals of the Commission's order, and prosecuted those appeals before the United States Court of Appeals for the District of Columbia Circuit ("circuit court"). On appeal, Bethel and KIST both contended the Commission's determination of Soto's status within the Sunland organization was procedurally flawed. They specifically noted the failure of the Commission to acknowledge the operation

and effect of the Commission's own rule, which had fixed the comparative qualifications of all applicants, including Sunland. Instead, they contended, the Commission had evaluated Soto's status in the Sunland partnership, and in the comparative proceeding, as of the date of the hearing, rather than as of the earlier procedural date, as would have been correct.

The circuit court, in its October 15, 1986 judgment (Pet. App. 3a), affirmed the Commission decision. In its accompanying unpublished memorandum, that court found the Commission's determination as to Soto's partnership and ownership status to be permissible.

Three applicants, including Bethel, petitioned the circuit court for rehearing of the matter, and suggested rehearing *en banc*. The focus of Bethel's petition for rehearing was the failure of the Commission to adhere to its own rules when evaluating the partnership and ownership status of Soto and the resulting comparative position of Sunland. On December 29, 1986, the circuit court entered orders denying the petitions for rehearing (Pet. App. 1a) and denying the suggestions for rehearing *en banc* (Pet. App. 2a).

## REASONS FOR GRANTING THE PETITION

The circuit court's affirmation of the Commission's order leaves standing an action wherein that agency arbitrarily and capriciously ignored the operation and effect of its own rules to the detriment of both the public interest and the procedural rights of several competing applicants, including this petitioner. Sunland prevailed over Bethel solely because of the degree of integration credit accorded to Sunland on account of Soto's proposed participation. The circuit court's erroneous decision, if allowed to stand, will represent a direct conflict with applicable decisions, not only of this Court, but also of the circuit court itself. Accordingly, review by this Court

is warranted to rectify the error of the circuit court, and to conform the actions in the matter at bar to applicable precedent.

**A. The Circuit Court's Affirmance of the Order of the Commission Ignores both the Rules of the Commission and the Precedents Established by the Decisions of this Court.**

In evaluating the comparative standing of mutually exclusive broadcast applicants, one of the most significant considerations is the degree to which the persons owning and controlling the applicant will be integrated into the day to day management of the proposed station. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965). Because of the importance of, and the comparative weight accorded to, this factor, the Commission often finds it necessary to examine the *bona fides* of the integration proposals of competing applicants. Such examination is particularly necessary in a situation such as the instant case, where an individual is recruited into an applicant group in order to take advantage of a perceived competitive enhancement accruing on account of that individual's racial or ethnic status. *Minority Ownership in Broadcasting*, 92 F.C.C. 2d 849 (1982). When faced with a questionable integration claim, the Commission seeks to determine whether the proposed participation can reasonably be expected to be active and significant. The Commission pursues such examinations because it recognizes that an integration proposal may be nominal or a "sham", with little or no likelihood of eventual implementation. *Alexander S. Klein, Jr.*, 86 F.C.C. 2d 423 (1981); *Berryville Broadcasting Company*, 70 F.C.C. 2d 1 (Rev. Bd. 1978); *Henderson Broadcasting Company*, 63 F.C.C. 2d 419 (Rev. Bd. 1977).

In the case at bar, the *bona fides* of Soto's proposed participation in the Sunland partnership was questioned, and closely examined at every level of the administrative process. Bethel is constrained to point out, however, that the Commission's examination on this point was under-

taken in light of a significant, but improper, enhancement of Sunland's comparative standing, which enhancement was in direct contravention of the Commission's own rules. This improper consideration was invalid, and should not have been affirmed by the circuit court.

In a proceeding involving mutually exclusive broadcast applications, the respective comparative positions of the competing applicants are fixed, pursuant to Section 73.-3522(a)(2) of the Commission's Rules (Pet. App. 149a), as of a date specified in a public notice issued by the Commission. This specified date is generally referred to as the "B cut-off date". In the administrative proceeding at issue herein, the B cut-off date promulgated by the Commission was September 7, 1981.

Mutually exclusive applicants seeking to amend their applications after the controlling B cut-off date may do so only with permission granted upon a showing of good cause. One of the Commission's six long standing criteria for determining whether good cause for such an amendment exists is that the amending applicant "will not gain a competitive advantage" by reason of the acceptance of its proposed amendment. *Belo Broadcasting Corp.*, 68 F.C.C. 2d 1313 (1978). *Erwin O'Connor Broadcasting Company*, 22 F.C.C. 2d 140 (Rev. Bd. 1970). Although Section 73.3522(a)(2) of the Rules refers only to predesignation amendments, Section 73.3522(b)(1) of the Rules (Pet. App. 150a) extends the same good cause requirement to postdesignation amendments.

The Commission does allow an applicant to amend its application after the relevant B cut-off date in order to avoid disqualification, or to report changes in material circumstances or information. When such amendments are allowed, however, they invariably are conditioned so as to prevent any enhancement of the applicant's competitive standing in the comparative proceeding. *Women's Broadcasting Coalition, Inc.*, —— F.C.C. 2d ——, 59 Rad. Reg. 2d (P&F) 730 (1986). *Las Misiones De*

*Bejar Television Co.*, 93 F.C.C. 2d 191 (Rev. Bd. 1983); *rev. denied*, —— F.C.C. 2d ——, 56 Rad. Reg. 2d 1481 (1984); *Birmingham Family Television, Inc.*, 91 F.C.C. 2d 348 (Rev. Bd. 1982). Previous judicial review of the Commission's cut-off procedure resulted in a determination that all factors affecting an applicant's competitive standing must be considered as of the appropriate B cut-off date, and without regard to any subsequent enhancement arising out of qualifying or reporting amendments. *TV 9, Inc.* v. *F.C.C.*, 495 F.2d 929 (D.C. Cir. 1973).

The improper post-B cut-off date enhancement of the Sunland application at issue herein had its genesis in the voluntary withdrawal from the Sunland partnership of George Strimel. Strimel, who held a ten percent (10%) ownership interest in the Sunland partnership, was one of Sunland's three general partners as of the controlling B cut-off date, September 7, 1981. (Pet. App. 9a, n. 4 and 88a, n. 17). Upon Strimel's withdrawal, his ten percent (10%) ownership interest was transferred to Jack Hodin, Sunland's majority partner.

Pursuant to the requirements of Section 1.65 of the Commission's Rules (Pet. App. 149a), Sunland was required to amend its application to reflect the change in its ownership composition occasioned by Strimel's voluntary withdrawal. On June 10, 1982 fully nine months after the applicable B cut-off date, Sunland petitioned the ALJ for leave to amend its application to reflect Strimel's voluntary withdrawal. The requested leave to amend was granted by order of the ALJ (Pet. App. 139a). At that point in the proceeding, the ALJ was sensitive to the potential for competitive enhancement accruing to Sunland as a result of the amendment. To forestall the possibility of such enhancement, the ALJ conditioned his order granting the amendment so as to specify that "no comparative advantage will accrue as a result of the acceptance of the amendment" (Pet. App. 142a, n. 3).

Fifteen (15) months later, when he issued his decision (Pet. App. 58a), the ALJ apparently had become ambivalent regarding the comparative effect of the Strimel amendment on the Sunland application. On one hand, the ALJ refused to allow comparative credit for the ten percent (10%) ownership interest transferred to Hodin upon Strimel's departure (Pet. App. 88a, n. 17). On the other hand, however, the ALJ proceeded to evaluate Soto's participation in the Sunland scheme as if Soto was one of only two partners, a configuration that did not exist until Strimel's post-B cut-off date departure from the partnership (Pet. App. 89a, footnote 19).

The Commission's subsequent order (Pet. App. 7a) echoed both the ALJ's ambivalence regarding the treatment of the B cut-off date, and his improper evaluation of Soto's status in light of the post-B cut-off date amendment (Pet. App. 9a, n. 4 and 11a, n. 7). In its order, the Commission acknowledged the legitimacy of the Review Board's determination that Soto lacked an "immediate financial obligation" with regard to the Sunland venture (Pet. App. 10a). The Commission did not feel compelled, however, to follow the Review Board's reasoning to its logical conclusion, namely the rejection of the Soto integration proposal. Instead, the Commission chose to examine the Sunland partnership agreement to determine whether Soto "will have a legitimate interest and influence in the Sunland partnership . . ." (Pet. App. 10a). The findings resulting from that examination are set forth in footnote seven of the Commission's order (Pet. App. 11a, n. 7). When those findings are compared with the text of the Sunland partnership agreement (Pet. App. 143a-148a), it immediately becomes apparent that the Commission, like the ALJ before it, has chosen to evaluate the agreement, and its effect on Soto's *bona fides*, in light of the post-B cut-off date amendment regarding the Strimel voluntary withdrawal. Such an evaluation is a clear violation of the Commission's own rules

and precedent regarding post-B cut-off date enhancements of an applicant's competitive posture.

For example, compare the Commission's conclusion that the Sunland partnership may be dissolved "only by unanimous agreement of the partners" (Pet. App. 11a, n. 7), with the language of the Sunland partnership agreement, as follows:

> Notwithstanding the foregoing, *Hodin and one other partner* may, at any time, agree to dissolve the partnership, in which event the partners shall proceed with reasonable promptness to liquidate the business of the partnership as provided for above. (emphasis added).

(Pet. App. 148a). Compare, further, the Commission's finding that "Soto must sign all checks withdrawing partnership funds" (Pet. App. 11a, n. 7), with the following text from the Sunland partnership agreement:

> 8. Banking. All funds of the partnership shall be deposited in its name in such accounts as shall be designated from time to time by the partners. All withdrawals therefrom shall be made upon *checks signed by two (2) partners, provided that Hodin must sign all checks*, unles he specifically authorizes one of the other partners to sign a particular check on behalf of the partnership. (emphasis added).

(Pet. App. 147a). In addition, compare the Commission's finding that:

> Soto's consent is required for the partnership to "borrow or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, security agreement, bond or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the partnership other than the type of property bought and sold in the regular course of business."

(Pet. App. 11a, n. 7), with the actual language of the relevant partnership provision, which reads as follows:

> Nevertheless, unless there is the written *consent of both Hodin and one other partner*, no partner shall on behalf of the partnership borrow or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, security agreement, bond or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the partnership other than the type of property bought and sold in the regular course of business. (emphasis added).

(Pet. App. 146a).

Although the partnership agreement specifically requires Hodin's participation for each of the enumerated partnership actions, there is no stated requirement that he obtain Soto's consent in order to take such actions. Under the agreement, Hodin need only obtain the consent of one other partner, not necessarily Soto. As of the B cut-off date, when there were three partners, Hodin, together with Strimel, had the ability to take any of the enumerated actions, even in the face of active opposition from Soto. Such an arrangement can hardly be considered to imbue Soto with the "negative control" the Commission found him to possess (Pet. App. 11a).

The Commission, in order to find Soto had "negative control" over partnership affairs, first had to give comparative effect to Sunland's post-B cut-off date amendment removing Strimel from the partnership. Such an action constitutes a violation of both the condition imposed on the Sunland amendment by the ALJ (Pet. App. 142a, n. 3) and the Commission's own rule against post-B cut-off date enhancement through amendment. *TV 9, Inc., supra; Women's Broadcasting Coalition, Inc., supra; Las Misiones De Bejar Television Co., supra;* and *Birmingham Family Television, Inc., supra.*

This failure of the Commission to follow its own rules also resulted in the derogation of Bethel's procedural rights under those rules.

What was in effect as of the B cut-off date was a partnership agreement among three individuals. That tri-

partite agreement reflects the appropriate comparative status of Sunland and its partners. The subsequent voluntary withdrawal of one partner, while converting the agreement to a pact between only two partners, could not modify or alter, retroactively, the B cut-off date comparative status of the partnership or its partners. Soto's standing in terms of the comparative process remained static, and should have been evaluated by the Commission in that light. If Soto's *bona fides* could not be sustained under the terms and conditions governing the Sunland scheme as of the B cut-off date, no subsequent enhancement of his status can operate to save the Sunland integration proposal as it relates to Soto. Sunland only may rely on, and the Commission should have considered the validity of Soto's participation only in light of, Strimel's presence.

The rules and regulations of a governmental agency, when validity promulgated pursuant to statutory authority, have the same force and effect as statutory law. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942). Such rules and regulations must be adhered to, even by the promulgating agency. The agency simply may not ignore its own rules. Actions of an agency are controlled by the agency rules to the same extent as parties within the jurisdiction of the agency are effected by the agency's rules. *Yellin* v. *United States*, 374 U.S. 109 (1963); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); *United States ex. rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

Parties dealing with an agency are entitled to rely upon the agency's rules and regulations. To the same extent an agency can enforce its rules and regulations against a party within its jurisdiction, a person whose interest is protected by the agency's rules is entitled to have the agency follow those rules. Such an affected person has the right to seek the enforcement of an agency's compliance with its own rules. *Yellin, supra; Vitarelli,*

*supra; and McKenna* v. *Seaton*, 259 F.2d 780 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 835 (1958). Any derogation by an agency of a substantive or procedural right attaching to a party by virtue of the agency's rules is a violation of due process. Therefore, any agency action that substantially and prejudicially ignores an agency's rules cannot stand. *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 915 (1964).

By allowing the Commission to consider the *bona fides* of Soto's partnership interest in the context of a post-B cut-off date enhancement of that interest, the circuit court improperly affirmed the Commission's violation of its own rules. That violation was clearly detrimental to the interests of Bethel.

The circuit court's failure to correct the Commission's error is especially surprising because that court recently had occasion to remind the Commission that "it is elementary that an agency must adhere to its own rules and regulations." *Reuters Limited* v. *F.C.C.*, 781 F.2d 946, 950 (D.C. Cir. 1986). Bethel respectfully suggests that it now falls to this Court to direct the circuit court to once again admonish the Commission with regard to the observance of its own rules, this time in the context of the B cut-off date, as it applies to the case at bar.

**B. The Circuit Court Has Attempted to Support the Commission's Order by Supplying a Reasoned Basis for the Order that the Commission Itself Has Not Given.**

The circuit court, in the memorandum accompanying its judgment, found it "permissible for the Commission to accept as *bona fide* the division of ownership rights and responsibilities between the general partners of Sunland Communications Company" (Pet. App. 5a). In attempting to support that finding, the circuit court further stated that "both Hodin and Soto, in fact as well as in form, assumed liability for partnership obligations to third parties" (Pet. App. 5a). Bethel is constrained to

point out that liability for partnership obligations to third parties was not addressed anywhere in the Commission's order, much less relied upon by the Commission as a basis for its determination as to the validity of Soto's purported partnership participation.

This attempt of the circuit court to formulate a *post hoc* justification for the Commission's action is improper. *Camp* v. *Pitts*, 411 U.S. 138 (1973). As this Court has stated:

> The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency has not given.

*Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). The circuit court, therefore, should have restricted its review to a determination as to whether the Commission's order contained proper and adequate support for the conclusions therein.

It is further suggested that the circuit court's finding in this regard, in addition to being improper, is also incorrect. In this regard, it should be noted that the Review Board, in its decision, stated as follows:

> Thus, even if Sunland received the instant construction permit and commenced operations, *Soto would still not have incurred one dime's worth of legal obligation or responsibility for the entity.* (emphasis added).

(Pet. App. 41a). The Commission, in its order, specifically cited this conclusion of the Board, with apparent approval (Pet. App. 9a, ¶ 4). It would appear, therefore, that the Commission did not find any "liability for partnership obligations" on the part of Soto, and in fact, may have felt compelled to find to the contrary. This factual discrepancy between the Commission's order and the circuit court's judgment is vivid testimony to the validity of this Court's admonition that "a judicial judgment

cannot be made to do service for an administrative judgment". *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

Bethel only wishes that the circuit court had followed its own recent advice to the Commission. Last year, the circuit court had occasion to admonish the Commission as follows:

> A reviewing court cannot do the agency's work for it: that is, the judiciary "may not supply a reasoned basis for the agency's action that the agency itself has not given.

*Celcom Communications Corp.* v. *F.C.C.*, 789 F.2d 67, 71 (D.C. Cir. 1986), *quoting, Motor Vehicle Manufacturers Association, supra.* Bethel trusts that this court now will direct the appropriate action.

The circuit court has not corrected the defects arising out of the Commission's failure to abide by its own rules, but, instead, has sought to supply a reasoned basis for the Commission's action that the Commission itself did not give, and, in fact may contradict the reasoning of the Commission. Unless corrected by this Court, the actions of the circuit court and the Commission will remain in conflict with the decisions of the Court, to the detriment of the public interest and this petitioner.

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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